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IN THE

Supreme Court of the United States

October Term, 1961.

No. 874.

BERNARD AUGUST,

Petitioner,

v.

BOARD OF PUBLIC EDUCATION,
SCHOOL DISTRICT OF PHILADELPHIA,

Respondent.

On Petition for Certiorari to the Supreme Court of Pennsylvania.

BRIEF FOR RESPONDENT IN OPPOSITION.

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OPINIONS BELOW.

The Opinions in the Supreme Court of Pennsylvania are appended to the Petition for Certiorari.

JURISDICTION.

Petitioner has invoked the jurisdiction of this Court under Title 28 U. S. C., Section 1257.

Respondent submits that no question under the Constitution of the United States is raised by the dismissal of a public school teacher on the statutory ground of "incompetency" under the teachers tenure laws of Pennsylvania after due notice of charges and hearing thereon, where the charge was based on the teacher's refusal to answer proper questions of his Superintendent.

The decision of the Pennsylvania Supreme Court was based on adequate non-federal grounds.

The petitioner did not raise in the Pennsylvania courts the constitutional questions urged in the Petition for Certiorari, and the Pennsylvania Courts did not decide the constitutional questions.

QUESTIONS PRESENTED.

1. Where the refusal of a teacher to answer pertinent questions of his Superintendent constitutes incompetency and ground for dismissal under state law, was it a denial of due process to dismiss the teacher on evidence that the Superintendent informed the teacher of the nature of the inquiry at a personal interview, and the teacher declined to answer until he consulted counsel and subsequently informed the Superintendent by telephone that he would not answer such questions?

2. Where there is evidence that the teacher knew of the importance of the Superintendent's inquiry and no evidence that the Superintendent explicitly warned the teacher that he might be dismissed if he failed to answer, was it a denial of due process to dismiss the teacher for refusal to answer?

3. Where the refusal of a teacher to answer pertinent questions of his Superintendent constitutes incompetency and ground for dismissal under state law, was it a denial of due process to dismiss a teacher who has so refused, when the teacher later answered similar questions of the Board of Public Education in the course of his testimony at the subsequent hearing on the charge of refusal to answer the Superintendent?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The due process clause of the Fourteenth Amendment of the Constitution is set forth in the Petition for Certiorari.

Section 1257 of the Judicial Code of the United States, 28 U. S. C. § 1257, provides:

> "Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> (3) By writ of certiorari, . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

STATEMENT.

This is a proceeding under the tenure provisions of the Public School Code of the Commonwealth of Pennsylvania, Act of March 10, 1949, P. L. 30, § 1122 et seq., as amended, 24 Purdon's Pa. Stat. Ann. §§ 11-1122 et seq., dismissing a public school teacher.

The Board of Public Education of the School District of Philadelphia dismissed the petitioner, after a hearing and due notice of charges, on the ground of incompetency. The charge was based on the refusal of petitioner to answer questions concerning alleged Communist affiliations in a professional interview with the Superintendent of Schools of the School District of Philadelphia.

At the written request of the Superintendent of Schools, petitioner reported to the Superintendent's office for a professional conference on October 14, 1952. At this conference, the Superintendent stated to the petitioner that he had information in his possession about which he would like to ask petitioner some questions, and that the material in his possession had an important bearing on petitioner's loyalty (R. 13a). Petitioner asked the Superintendent why should he admit anything when he did not know whether the Superintendent could corroborate or support the statements (R. 13a).

Although the Superintendent testified at the subsequent hearing before the Board of Public Education on the charges against petitioner that he did not ask petitioner any specific questions, the petitioner himself testified that the Superintendent told him that one of the questions was whether he was a member of the North Philadelphia branch of the Professional Section of the Communist Party (R. 50a).

The petitioner expressed a desire to consult counsel and the Superintendent gave him the opportunity to do so. On October 22, 1952, petitioner called the Superintendent on

the telephone and said that he had consulted counsel and that he would not answer the questions (R. 14a-15a).

The Board of Public Education conducted a formal hearing on the charges as required by Section 1127 of the Public School Code of 1949. The hearing was private at the request of the petitioner. At the hearing, the Superintendent testified concerning his interview with petitioner, petitioner's failure to answer questions at that time and petitioner's subsequent telephone call after he had consulted counsel.

The petitioner was represented by counsel at the hearing before the Board. He voluntarily testified over objection by counsel for the Board that he had been a member of the Communist Party up to 1950, that he had not been at all active in the Party after 1950 and that he had been advised by his attorney that he should not answer any questions asked by the Superintendent of Schools concerning his associations prior to the time of the enactment of the Pechan Act (Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. § 211).

The Board of Public Education sustained the charges against petitioner and ordered his dismissal. Petitioner appealed to the Superintendent of Public Instruction of the Commonwealth of Pennsylvania, as provided by the Public School Code, and the decision of the Board was affirmed. As further provided by the Public School Code, petitioner appealed to the Court of Common Pleas of Philadelphia County. On this appeal, petitioner did not request a hearing de novo as permitted on such an appeal by Section 1132 of the Public School Code, 24 Purdon's Pa. Stat. Ann. § 11-1132. He filed with his appeal his Exceptions to the adjudication of the Superintendent of Public Instruction which are appended to the Petition for Certiorari (pp. 41-44), and his appeal was heard on the record of his hearing before the Board of Public Education.

The Court of Common Pleas No. 6 of Philadelphia County sustained his appeal and set aside the dismissal on

the ground that he had not been asked a specific question (R. 137a, 147a).

The Board of Public Education appealed to the Supreme Court of Pennsylvania, which held that the dismissal of petitioner on the ground of incompetency under the Public School Code was warranted, reversed the order of the Court of Common Pleas and sustained the petitioner's dismissal.

After the decision of the Supreme Court, petitioner filed with the Supreme Court of Pennsylvania a Petition for Leave to File a Petition for Reargument and a Petition for Reargument, copies of which are appended to this Brief in Opposition (pp. 17-19). Both of these petitions were denied by the Supreme Court February 28, 1962, Per Curiam, without opinion (Pettition for Writ of Certiorari, p. 40).

ARGUMENT.

I. Petitioner Did Not Raise the Constitutional Questions in the State Court, and the State Court Did Not Decide the Constitutional Questions.

It is submitted that this Court is without jurisdiction under 28 U. S. C. § 1257, because the "title, right, privilege or immunity" now claimed by petitioner was not "specially set up or claimed under the Constitution of the United States" in the Pennsylvania courts.

It is apparent from the statement of Questions Presented and the Method of Raising Constitutional Questions, as set forth in the Petition for Certiorari (pp. 2, 6-7), that petitioner did not raise at any time in the state courts the constitutional questions which he now urges as meriting review by this Court. It is equally apparent from examination of the Opinion of the Supreme Court of Pennsylvania (Petition for Certiorari, pp. 11-34), that that Court did not consider and did not decide any questions under the Constitution of the United States.

The principal question raised in the Supreme Court of Pennsylvania was whether its decision in *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956) [1] was still the law of Pennsylvania. The Pennsylvania Supreme Court had held in the *Beilan* case that the refusal of a public school teacher to answer questions of his Superintendent of Schools, in a professional interview regarding former Communist affiliations, constituted "incompetency" as a ground for dismissal under the tenure provisions of the Pennsylvania Public School Code (24 Purdon's Pa. Stat. Ann. § 11-1122). The Court had also decided in the *Beilan* case that a proceeding to dismiss the teacher for incompetency on the ground of his refusal to answer such

1. Affirmed by this Court in *Beilan v. Board of Public Education*, 357 U. S. 399 (1958).

questions of the Superintendent could properly be brought under the Public School Code, and that the Board was not precluded from so proceeding by the enactment of the Pennsylvania Loyalty Act of December 22, 1951, P. L. 1726, 65 Purdon's Pa. Stat. Ann. § 211. It was contended by the present petitioner in the Supreme Court of Pennsylvania that that Court had overruled its decision in the *Beilan* case by statements contained in its Opinion in *Board of Public Education v. Intille*, 401 Pa. 1, 163 A. 2d 420 (1960). The Court held, however, as it did in the case of *Board of Public Education v. Soler*, 406 Pa. 168, 176 A. 2d 632 (1962), that its decision in the *Beilan* case had not been overruled and that refusal by a teacher to answer his Superintendent constituted incompetency as a ground for dismissal under the Pennsylvania Public School Code.

Petitioner does not now challenge this conclusion grounded on an interpretation of the state law, nor does he seek to raise again the constitutionality of the conclusion, which was settled by the decision of this Court in *Beilan v. Board of Public Education*, 357 U. S. 399 (1958).

Petitioner did contend in the Supreme Court of Pennsylvania that his case should be distinguished from the *Beilan* case, on the ground that he had not been asked any question and that he had not refused to answer a question. He did not raise this issue, however, as a matter of any alleged deprivation of due process of the law or other violation of the Constitution. The contention was made as a matter of the sufficiency of the evidence. The Opinion of the Supreme Court so treated it in rejecting the contention. The Opinion pointed out (Petition for Certiorari, pp. 17-18):

> "... It is true that, taken apart from everything else in the record, one could read from replies made by Dr. Hoyer, in one circumscribed part of the record, that August was not questioned. However, when one reads the entire record it becomes as plain as a pikestaff that August was under interrogation at that first interview. ..."

The Court then quoted from the testimony of petitioner himself at his hearing before the Board, wherein he stated that Dr. Hoyer (the Superintendent of Schools) said to him that one of the questions he intended to ask was whether petitioner was a member of the North Philadelphia branch of the Professional Section of the Communist Party (R. 50a).

Thus, petitioner is in error in stating in his Petition that there was no evidence that he was asked a question which he refused to answer. Petitioner's Statement of the Case omits any reference to petitioner's testimony about his interview with Dr. Hoyer, in spite of the specific reference to it in the Opinion of the Supreme Court of Pennsylvania.

The Supreme Court of Pennsylvania also held that the statement made by petitioner to the Superintendent on the telephone, that he would not answer such questions, constituted a refusal to answer questions with the same effect as if the refusal had been manifested in a second professional interview, and that it would have been futile for the Superintendent to have arranged a second conference or interview with the petitioner after this refusal (Petition for Certiorari, pp. 18-19).

Thus, the Court held that the evidence was sufficient to show that the petitioner had in fact refused to answer questions of the Superintendent of Schools. At no time did petitioner contend in the Supreme Court of Pennsylvania or in any of the subordinate tribunals that such a determination would violate due process of law.

A second question which petitioner now urges as meriting review by this Court is that it was a denial of due process to dismiss him for refusal to answer, on the ground that he was given no warning that his refusal to answer might be ground for dismissal. Petitioner never raised this issue in the Pennsylvania courts. He not only failed to raise it as a matter of constitutional due process, but also failed to contend that the alleged lack of warning of

the consequences of refusal to answer would be any barrier to dismissal under either state law or federal law. The alleged lack of warning was not raised by petitioner as an issue in any way, as is plainly shown by the Method of Raising Constitutional Questions, set forth in the Petition for Certiorari (pp. 6-7).

The third question presented by petitioner as ground for review by this Court is that it was a denial of due process of law to dismiss him for refusal to answer the Superintendent of Schools when he had subsequently answered all relevant questions asked by the Board of Public Education in his hearing before the Board on the charge of having refused to answer the Superintendent.

Petitioner did contend in both the Court of Common Pleas and in the Supreme Court of Pennsylvania that his willingness to answer questions before the Board of Public Education and to tell that Board about his former Communist membership and affiliations atoned completely for his refusal to answer the Superintendent of Schools. This contention was rejected by the Supreme Court of Pennsylvania, although the Court of Common Pleas had apparently found some merit in the contention.

The argument of petitioner that he was entitled to this "locus penitentiae" was never advanced by petitioner or considered by the Courts as a matter of due process of law or other constitutional provision. It was treated by petitioner himself as a concept of the state law, as a defense to the charge of incompetency, and the Supreme Court of Pennsylvania held that the Pennsylvania law did not recognize this defense under the circumstances, that the petitioner's assumed "penitence" was a sham and a pretense, that it came too late, and that the petitioner's duty was to show candor and intellectual honesty toward his Superintendent and not merely to the Board of Public Education when he was before it on the charge of refusal to cooperate with the Superintendent. In so deciding, the Court did not touch any constitutional issue.

After the decision of the Supreme Court of Pennsylvania, petitioner filed with that Court a Petition for Leave to File a Petition for Reargument (Appendix, pp. 17-19). There were three grounds for seeking reargument, the first and third of which merely sought reconsideration of the questions of state law previously argued and expressly considered by the Court. The second ground for urging reargument attempted to raise, *for the first time*, a constitutional question, by the following statement:

> "As stated by the dissenting Opinion, there is involved a denial of due process as assured by both the Constitution of this Commonwealth and of the United States, *which denial is not considered by the Opinion of the Court and was not raised or considered by either appellant or appellee in either the briefs or oral arguments.*"

Thus, petitioner conceded in his Petition for Reargument that he had not previously raised and that the Court had not considered the constitutional questions which he now urges this Court to review.

The Supreme Court of Pennsylvania denied the Petition for Leave to File a Petition for Reargument and the Petition for Reargument without opinion.

It is settled by the decisions of this Court that the raising of a constitutional question for the first time on a Petition for Rehearing addressed to the state Court is not sufficient to give this Court jurisdiction under 28 U. S. C. § 1257, unless the state Supreme Court actually entertains the Petition for Rehearing or Reargument and considers and decides the constitutional question. In this case, the Pennsylvania Supreme Court denied the Petition for Reargument without opinion.

Radio Station WOW v. Johnson, 326 U. S. 120 (1945);

Herndon v. Georgia, 295 U. S. 441 (1935).

Petitioner is not in a position to complain that he had no opportunity to raise the constitutional questions in the Pennsylvania courts, which he now desires to raise by Petition for Certiorari. The fact that he was the appellee in the Supreme Court of Pennsylvania did not prevent him from raising these issues as alternate grounds for affirmance. Likewise, petitioner cannot claim that the decision of the Supreme Court of Pennsylvania was such a surprise to him that he had no adequate opportunity to raise the constitutional issues. It was surely foreseeable that the Pennsylvania Supreme Court would adhere to its previously expressed rule of *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956) and decide the question of the state law against petitioner as it did. Petitioner was originally the appellant in the administrative appeal to the State Superintendent of Public Instruction from his dismissal by the Board of Public Education. He also appealed from the decision of the State Superintendent to the Court of Common Pleas.

Furthermore, petitioner did not raise these constitutional questions on his appeal from the Superintendent of Public Instruction to the Court of Common Pleas, although he filed Exceptions with the Court, which are printed in the Appendix to the Petition for Certiorari (pp. 41-44).

The decision of the Supreme Court of Pennsylvania rested on non-federal grounds which were completely adequate to support the result.

II. The Constitutional Questions Raised by Petitioner Are Insubstantial.

1. The Contention That There Was No Evidence That Petitioner Refused to Answer a Question Does Not Raise a Substantial Constitutional Question.

Petitioner argues that the evidence showed that he was not asked a question and that therefore there was no evidence that he refused to answer a question. In support of this contention, petitioner printed in his Petition for Cer-

tiorari (pp. 3-4) only an isolated extract from the record of his hearing, in which the Superintendent testified that he told petitioner he wanted to ask him questions relating to his loyalty and did not ask a specific question.

In disposing of the argument that petitioner had not refused to answer a question, the Opinion of the Supreme Court of Pennsylvania pointed out that the entire record clearly showed that petitioner was under interrogation at his interview, and quoted the testimony of petitioner himself that the Superintendent told him that one of the questions was whether petitioner was a member of the North Philadelphia branch of the Professional Section of the Communist Party of Philadelphia. (Petition for Certiorari, pp. 17-18).

Similarly, the Supreme Court of Pennsylvania rejected the contention of petitioner that he did not refuse to answer questions when he was given the opportunity to consult counsel and then communicated his refusal to answer to the Superintendent by a telephone call in place of having a second personal conference with the Superintendent.

The evidence was fully adequate to show that petitioner refused to answer questions as charged. In any event, the sufficiency of the evidence is not a constitutional question. The determination that the evidence was sufficient constitutes a finding of fact by the Court, and this Court will not review the finding of fact of a state Supreme Court.

> "There are no exceptional circumstances of any kind that would justify us in rejecting the Supreme Court's findings, they are not without factual foundation, and we accept them." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U. S. 157, 160 (1952).

See also *Portland Railway, Light & Power Co. v. Railroad Commission of Oregon*, 229 U. S. 397, 412 (1913).

2. THE CONTENTION THAT PETITIONER WAS NOT WARNED THAT HIS REFUSAL TO ANSWER MIGHT BE GROUND FOR DISMISSAL DOES NOT PRESENT A SUBSTANTIAL CONSTITUTIONAL QUESTION.

Petitioner was called for a personal interview with the Superintendent of Schools of the School District of Philadelphia. The Superintendent informed petitioner that he desired to ask him questions which had an important bearing on his loyalty. Petitioner requested and was accorded the right to consult counsel. Under these circumstances, there is no doubt that petitioner fully understood that the inquiry was important and that the Superintendent considered it important. Certainly no further explicit warning that refusal to answer such questions could lead to dismissal was necessary.

Petitioner was dismissed for incompetency under the Pennsylvania Public School Code. The incompetency consisted of lack of candor in refusing to answer important questions relating to his professional fitness asked by his superior, the Superintendent of Schools.

The Supreme Court of Pennsylvania did not deal explicitly with the contention that petitioner was not given warning of the consequences of dismissal for refusal to answer, as petitioner never raised this question, as a matter of either state law or federal law. The Court did state in its Opinion, however, that petitoner was not naive, and that he knew that the Superintendent did not intend to talk to him on the state of the weather but on the state of his attachment to Communist ideology (Petition for Certiorari, p. 19).

The Opinion also referred to petitioner's response to the Superintendent's statement that he desired to question petitioner regarding loyalty, to which petitioner said, "Why should I admit anything before I see whether you can corroborate it?", as showing petitioner's lack of candor and his deficiency in professional attitude, civic responsibility, appreciation and ideals (p. 20).

The Pennsylvania Supreme Court was fully warranted in concluding that petitioner thoroughly understood the importance of the inquiry and the necessity of responding to it, and that he was properly found to be incompetent because of his failure to answer. In all material respects, the case of petitioner is the same as that of *Board of Public Education v. Beilan*, 386 Pa. 82, 125 A. 2d 327 (1956), affirmed 357 U. S. 399 (1958), where refusal to answer the Superintendent under similar circumstances was held to be incompetency, and dismissal on this ground did not infringe any constitutional right of the teacher. The fact that there was no evidence that petitioner was explicitly warned of the consequences of his refusal is not a material distinction.

Accordingly, this question is not a substantial one for this Court, even if it had been raised by the petitioner in the state courts.

3. The Contention That Petitioner Should Not Be Dismissed for His Refusal to Answer the Superintendent, When He Subsequently Testified Before the Board of Public Education, Does Not Raise a Substantial Question.

Petitioner was charged with incompetency in refusing to answer questions of the Superintendent of Schools. At his hearing before the Board of Public Education on this charge, he offered to answer any questions of the Board of Public Education regarding his former Communist affiliations and was permitted to so testify, over objection of counsel for the Board. The testimony was not directly material to the charge of refusal to answer the Superintendent. Its only relevancy was to confirm that there was a highly important reason for the Superintendent's desire to question this teacher and to show that petitioner had important and relevant information which he could have given the Superintendent if he had not refused.

As the Opinion of the Supreme Court of Pennsylvania pointed out, petitioner was one of 8,000 teachers employed

in the Philadelphia school system and owed a duty to his administrative superior, the Superintendent. He did not compensate for his failure to perform this duty by his willingness, much later, to answer questions before the Board of Public Education at a hearing which was concerned with his refusal to answer the Superintendent and not with his Communist affiliations (Petition for Certiorari, pp. 31-33).

The Court also considered that petitioner was not sincerely penitent for his refusal to answer the Superintendent (pp. 32-33).

In so concluding, the Pennsylvania Supreme Court did not decide any federal constitutional question, and petitioner had never raised this contention as a constitutional issue.

It is manifest that if the refusal of an employee to answer questions of his administrative superior is ground for dismissal, as has been established in Pennsylvania, the question of whether it is a defense to that charge to be willing at a later time to answer similar questions of the governing Board is not a matter arising under the Federal Constitution and involves no question of due process of law. At most, it involved only a question of state law.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the Petition for Certiorari should be denied.

Respectfully submitted,

EDWARD B. SOKEN,
Attorney for Respondent.

Appendix

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 473, January Term, 1961.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

BERNARD AUGUST,

Appellee.

PETITION FOR LEAVE TO FILE A PETITION FOR REARGUMENT.

And Now comes appellee and petitions this Court the privilege and right to file a petition for reargument, attached hereto, even though said petition is filed more than 10 days from entry of final judgment by this Court, and in support thereof appellee alleges:

1. Appellee's counsel's press of other legal matters prevented appellee's counsel from proper and due consideration of the wisdom of filing a petition for reargument and appellee's counsel just learned of the fact alleged in first assigned reason for reargument.

2. The issues involved in the requested petition for reargument are of substantial constitutional importance not only to appellee but to all public employees.

3. This Court's Rule 71 specifically allows the extension of time for the filing of petition for reargument upon cause shown.

Respectfully submitted,

WILLIAM J. WOOLSTON,
Attorney for Appellee.

IN THE
SUPREME COURT OF PENNSYLVANIA

No. 473, January Term, 1961.

BOARD OF PUBLIC EDUCATION
SCHOOL DISTRICT OF PHILADELPHIA

v.

BERNARD AUGUST,

Appellee.

PETITION FOR REARGUMENT.

To the Honorable Court:

And Now comes appellee and petitions this Court for reargument for the reasons overlooked or misapprehended by the Court, which are set forth below:

1. The Opinion of this Court is in error in holding that *Board of Public Education v. Intille, et al.*, 401 Pa. 1, did not directly overrule *Board of Public Education v. Beilan*, 386 Pa. 82, for appellees' brief in *Board of Public Education v. Intille, et al.*, in its statement of questions specifically raised the contention that the refusal to answer a question by a Congressional Committee implying subversive affiliations was an act of incompetency under the Public School Code and the Court's final paragraph specifically rejects that contention and specially states "anything in the Beilan case to the contrary is herewith overruled for the future".

2. As stated by the dissenting Opinion, there is involved a denial of due process as assured by both the Constitution of this Commonwealth and of the United States, which denial is not considered by either appellant or appellee in either the briefs or oral arguments.

3. This Court reverses what it held in *Beilan* and repeated verbatim in *Imble* as to application of locus penitentiae for a teacher such as Deacon, who "volunteered his unrestrained revelation of his buried aberration of the past" and "who has entirely discarded past subversive affiliations and has abided by a loyalty oath in good faith".

WHEREFORE it is prayed that this Court grant reargument for reconsideration of the above three legal questions, all of which are substantial legal principles which in the future will be applicable to others.

Respectfully submitted,

WILLIAM J. WOOLSTON,
Attorney for Appellee.